

DANIEL T. COOPER

IBLA 97-515

Decided September 28, 1999

Appeal from a decision of the Area Manager, Ridgecrest Resource Area, California, Bureau of Land Management, approving issuance of a special recreation permit for a noncompetitive commercial motorized off-highway vehicle event. CA-060-SR7-98.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Permits--Special Use Permits

The regulations at 43 C.F.R. Subpart 8372 govern the adjudication of applications for special recreation permits other than on developed recreation sites, including off-road vehicle events involving 50 or more vehicles. These regulations are properly distinguished from the regulations at 43 C.F.R. Part 8340 regarding closure of public lands to off-road vehicle use.

2. Federal Land Policy and Management Act of 1976:
Permits--Special Use Permits

A decision denying an application for a special recreation permit for an off-road vehicle event involving more than 50 motorcycles over existing unpaved roads through a wilderness area will be affirmed when the record provides a reasoned analysis to support the conclusion that denying the application is in the public interest.

APPEARANCES: Daniel T. Cooper, pro se; Lee Delaney, Area Manager, Ridgecrest Resource Area, Bureau of Land Management, U.S. Department of the Interior, Ridgecrest, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Daniel T. Cooper has appealed from a decision of the Area Manager, Ridgecrest Resource Area, California, Bureau of Land Management (BLM), dated March 31, 1997, approving issuance of a special recreation permit (SRP) (CA-060-SR7-98). The application was for a noncompetitive commercial

motorized off-road vehicle (ORV) event to be conducted May 17-18, 1997, in southern California. ^{1/} This appeal was from the March 31 decision to the extent it rejected part of the proposed route.

On January 16, 1997, the application for an SRP for the "97 China Lake 300 dual sport [motorcycle] self-guided tour from Ridgecrest to Lone Pine and back." (Letter to BLM from Counts, dated Jan. 14, 1997.) The applicants anticipated that the event would involve 120 dual sport motorcycles traversing public, as well as other Federal, State, and private lands, using 300 miles of existing roads and trails. The applicants' entire proposed route was identified on maps attached to the application.

Included in the applicants' proposed route was a segment which crosses public lands, following the "[R]idge [R]oad" from Cerro Gordo north to the Burgess Mine along the crest of the Inyo Mountains and west to Swansea on the Swansea Road." (Decision at 1.) The Ridge and Swansea Roads bisect the "Inyo Mountains Wilderness," which was designated a wilderness area by Congress on October 31, 1994, pursuant to section 102 of the California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471, 4472, 4476. The two roads are described by BLM as primitive dirt roads: "In most cases, the road[s] * * * [are] only 8-10 feet wide. [They are] also rugged, very steep in portions, and exceed[] elevations of 8000 feet." (Environmental Assessment (EA) (No. CA-065-94-22), dated Apr. 11, 1994, at 8.)

The Ridge and Swansea Roads are situated in BLM's Bishop Resource Area, California. They are within a portion of the "South Inyo Management Area" which was designated, under the April 1993 Bishop RMP, as subject to limited ORV use, with such use generally restricted to designated roads and trails. (Bishop RMP Record of Decision, dated March 25, 1993, at 17-18.) Prior to designation of the wilderness area, the Ridge and Swansea Roads ran between two wilderness study areas (WSA) (Inyo Mountains (WSA-122) to the east and Cerro Gordo (CA-010-055) to the west, in the case of the Ridge Road, and Southern Inyo (CA-010-056) to the north and Cerro Gordo to the south, in the case of the Swansea Road), which had been designated pursuant to section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1782 (1994).

^{1/} The application (Form 8370-1, November 1992) refers to an "OHV" (off-highway vehicle) permit. This term is frequently used in BLM land planning documents. See, e.g., Bishop Resource Management Plan (RMP) Record of Decision (April 1993). Under relevant regulations, motorcycles fall within the definition of ORV's. An ORV is defined, with certain exceptions, as "any motorized vehicle capable of, or designed for, travel on or immediately over land, water, or other natural terrain." 43 C.F.R. § 8372.0-5(i).

The application for the SRP was filed by Jerry Counts. However, Counts and appellant Cooper later informed BLM that they were joint applicants. (Letter to BLM from Counts, dated Apr. 5, 1997; Letter to BLM from Cooper, dated Mar. 10, 1997.)

On February 22, 1994, the Area Manager, Bishop Resource Area, issued a decision adopting an "Interim Management Policy" (IMP), regarding the appropriate use of the Ridge and Swansea Roads, pending wilderness designation and promulgation of a wilderness management plan which would address the use of roads adjacent to designated wilderness lands and other matters. The IMP provided that until a wilderness management plan was prepared, no SRP's would be issued for the Ridge and Swansea Roads, although they would remain open to casual use. This meant that recreational use of the Ridge and Swansea Roads for commercial or competitive purposes or for an ORV event involving 50 or more vehicles was prohibited, because an ORV event required an SRP under the relevant regulations at 43 C.F.R. § 8372.1-1. (Letter to Cooper from Bishop Area Manager, dated Mar. 18, 1997.) The roads were not closed to all ORV use. Rather, as Cooper recognizes, they remained open to "casual use," which meant that recreational use for noncommercial and noncompetitive purposes which did not involve 50 or more vehicles and did not require a permit was allowed. (IMP Decision, dated Feb. 22, 1994; see Statement of Reasons for Appeal (SOR) at 5; Cooper's "Request for the Administrative Record" (Request) at 3.) The Bishop Area Manager further stated: "Following passage of the Wilderness legislation, a Wilderness Management Plan will be prepared for the area. Appropriate use of these roads will be analyzed in the plan. A decision will then be issued for permitted events on these roads." (IMP Decision, dated Feb. 22, 1994.)

The record indicates that the February 1994 IMP decision was consistent with two prior environmental analyses prepared for earlier SRP applications for similar dual sport motorcycle events which proposed use of the Ridge and Swansea Roads. ("Administrative Determination Record," dated Feb. 22, 1994.) The EA's (CA-065-93-17 and CA-065-94-22) had been prepared in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), by BLM's Ridgecrest Resource Area Office (BLM Ridgecrest), with assistance from the Bishop Resource Area Office. Based on the EA's, the Ridgecrest Area Manager had prohibited use of the Ridge and Swansea Roads in connection with proposed ORV events in 1993 and 1994.

The most significant impacts of running the event along the proposed route along the Ridge Road from Cerro Gordo to the Swansea Road and over the latter trail to Swansea are the effect on the surrounding WSA's and the threat to the safety of the participants. The EA's disclose that these roads are "rugged four-wheel drive road[s] * * * maintained solely by the passage of vehicles," are only 8-10 feet wide traversing rugged terrain at elevations in excess of 8,000 feet, and are "very steep in portions." (EA (CA-065-93-17), dated Apr. 6, 1993, at 2, 7; EA (CA-065-94-22), dated Apr. 11, 1994, at unnumbered pp. 2, 8.) In its analysis, BLM found that "a group of riders may exacerbate the erodible nature of area soils resulting in sedimentation problems off the road and, consequently, in adjoining WSAs." (EA (CA-065-93-17) at 8; EA (CA-065-94-22) at 7-8.) Further, BLM noted the risk of adverse impact to vegetation and wildlife in the WSA's from riders who stray off the course. (EA (CA-065-93-17) at 7; EA (CA-065-94-22) at 8.) In addition, the BLM analysis found that the rugged and

remote nature of the roads, which are inaccessible by two-wheel drive vehicles, posed significant problems in the event of accidents, medical emergencies, or breakdowns. (EA (CA-065-93-17) at 8; EA (CA-065-94-22) at 8.) As a result of the analysis, mitigation in the form of prohibiting the use of the Ridge and Swansea Roads was required by BLM. (EA (CA-065-93-17) at 9; EA (CA-065-94-22) at 10.)

The BLM decision to issue the SRP subject to elimination of the Ridge and Swansea Road routes was made in conjunction with an Administrative Determination (AD) by the BLM Area Manager, Ridgecrest Resource Area, dated April 14, 1997. ^{2/} In that document, the Ridgecrest Area Manager considered whether the proposed ORV event complied with the applicable land-use plan (California Desert Conservation Area (CDCA) Plan), as required by section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (1994), and assessed the environmental impacts of the proposed event, as required by section 102(2)(C) of NEPA.

The Ridgecrest Area Manager first concluded that the proposed ORV event did conform to the CDCA Plan. (April 1997 AD at 2.) Further, he determined that the likely environmental impacts of permitting the proposed ORV event, and reasonable alternatives thereto, had previously been considered in a 1995 programmatic EA (No. CA-065-94-32), entitled "Non-Competitive Motorized Vehicle Touring and Dual Sport Events," and that no further environmental analysis was needed because there had been no significant change in circumstances and no new information since that time. Id. In the 1995 programmatic EA, BLM Ridgecrest had analyzed the potential environmental impacts of permitting noncompetitive motorized ORV tours and events on designated or existing roads and trails. The tours/events analyzed at that time were those which were expected to occur on public lands in the portions of the Ridgecrest Resource Area (which encompasses lands in Kern, Inyo, San Bernardino, and Mono counties), where such activity was not otherwise prohibited.

Finally, in his April 1997 AD, the Ridgecrest Area Manager approved the proposed ORV event, subject to certain mitigation measures. He generally approved the applicants' proposed route, excepting the Ridge and Swansea Roads, citing the Bishop Area Manager's 1994 IMP, which prohibited recreational use for commercial or competitive purposes or which constituted an ORV event involving 50 or more vehicles on these roads, as being "still in effect." ^{3/} (April 1997 AD at 2.) In place of the Ridge and

^{2/} In its answer on appeal, BLM explains that Ridgecrest and Bishop BLM offices agreed to coordinate administration of SRP's involving both resource areas. Since the start of the event and the majority of the activity applied for in SRP CA-060-SR7-98 was in the Ridgecrest Area, that office "took the lead in issuing the permit." (BLM Answer at 1.)
^{3/} BLM Ridgecrest received a copy of a Mar. 18, 1997, letter to Cooper from the Bishop Area Manager, noting that:
 "No wilderness [management] plan has been prepared to address road management and appropriate permitted uses since the adjacent area was designated

Swansea Roads, BLM offered an alternate route which followed a county road from Cerro Gordo to Keeler/Highway 136.

The approved ORV event took place on May 17-18, 1997. Although an appeal is ordinarily dismissed as moot when events occurring since the appeal was filed preclude any effective relief on appeal, an exception is recognized in certain circumstances. An appeal is properly adjudicated when the issues raised are capable of repetition yet evading review because the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and there is a reasonable expectation that the same issue will be presented in similar circumstances in the future. Coalition for the High Rock/Black Rock Emigrant Trail National Conservation Area, 147 IBLA 92, 94-95 (1998). Those circumstances apply here and, hence, this appeal will not be dismissed as moot.

Cooper contends that BLM's 1994 IMP constituted an illegal closure of the Ridge and Swansea Roads in violation of the procedural requirements of Executive Order (EO) No. 11644 (37 Fed. Reg. 2877 (Feb. 9, 1972)), as amended by EO No. 11989, dated May 24, 1977 (42 Fed. Reg. 26959 (May 25, 1977)). (SOR at 6, 8 (citing National Wildlife Federation v. Morton, 393 F. Supp. 1286 (D.D.C. 1975)).) Appellant notes that Morton recognized that EO No. 11644 requires BLM to designate all ORV routes on public lands as either open, restricted, or closed to ORV use, pursuant to a mandated "process" which involves applying certain expressed criteria and public participation. (SOR at 6.) Appellant asserts that BLM failed to follow the process required by EO No. 11644 when it restricted the ORV use of the Ridge and Swansea Roads. Hence, appellant concludes that, since BLM did not properly restrict ORV use of the Ridge and Swansea Roads in accordance with the EO, those roads remain open to use for ORV events such as that contemplated in the SRP permit application. Id. at 7-8. Appellant also challenges the validity of the regulation at 43 C.F.R. § 8372.1-1(c) requiring a SRP for ORV events involving 50 or more vehicles as being in violation of EO No. 11644.

In its answer, BLM points out that the Ridge and Swansea Roads remain open for casual use. (BLM Answer at 3.) Further, BLM contends that the regulations at 43 C.F.R. Subpart 8372 governing SRP's on sites other than developed recreation sites does not address the designation of public lands for vehicle access pursuant to EO No. 11644. Id. at 4. Rather, BLM asserts that closures of public lands to vehicle access pursuant to EO No. 11644 are governed by the regulations at 43 C.F.R. Part 8340 governing use of ORV's on public lands generally. Id. Hence,

fn. 3 (continued)

wilderness in 1994. Until further notice, this interim policy is still in effect since our primary objective is to ensure that the adjoining wilderness area's integrity is maintained and that visitor safety has been addressed."

(Letter to Cooper from Bishop Area Manager, dated Mar. 18, 1997.)

BLM contends that the regulations at 43 C.F.R. Subpart 8372 are properly applied to adjudicate an application for an SRP for a commercial event involving more than 50 vehicles. Id.

[1] A fundamental distinction is properly drawn between closure of the public lands to vehicle use pursuant to the regulations at 43 C.F.R. Part 8340 and the regulations governing SRP's at 43 C.F.R. Subpart 8372. It is clear from the record that the Ridge and Swansea Roads are not closed to ORV use. Appellant was not barred from ORV use of these roads. Rather, acting through his associate, he filed an application for an SRP for a commercial noncompetitive event for 120 ORV (motorcycle) riders. By regulation, an SRP is required for commercial use or for ORV events involving 50 or more vehicles. 43 C.F.R. § 8372.1-1(a), (c). In many prior appeals, this Board has recognized that section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1994), and the regulations at 43 C.F.R. Subpart 8372 establish the authority for BLM approval of SRP's for recreational use of ORV's on the public lands. Lassen Motorcycle Club, 133 IBLA 104, 106 (1995); Eastern Sierra Audubon Society, 126 IBLA 222, 227 (1993); American Motorcycle Association, District 37, 119 IBLA 196, 198-99 (1991); Owen Severance, 118 IBLA 381, 389 (1991); Cascade Motorcycle Club, 56 IBLA 134, 137 (1981). Appellant's contention that the regulation at 43 C.F.R. § 8372.1-1(c) was improperly promulgated in violation of EO No. 11644 is without foundation.

[2] It is well established that BLM has considerable discretion, under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1994), and 43 C.F.R. Subpart 8372 regarding the approval of SRP's for recreational use on the public lands. 43 C.F.R. § 8372.3; Lassen Motorcycle Club, supra. A decision made in the exercise of BLM's discretionary authority must have a rational basis, and thus not be arbitrary and capricious. However, we have long held that a BLM decision to approve or deny an SRP will be affirmed by the Board if the record demonstrates that the decision was reached through reasoned analysis giving due consideration to the public interest and all other relevant factors, that there was a rational connection between the facts found and the choice made, and that there are no compelling reasons for modification or reversal. Deschutes River Public Outfitters, 135 IBLA 233, 240 (1996); Checker Motorcycle Club, 126 IBLA 251, 254 (1993); Four Corners Expeditions, 104 IBLA 122, 125! 26 (1988).

In his March 31, 1997, decision the Ridgecrest Area Manager did not set out a detailed explanation of the basis for his denial of the applicants' use of the Ridge and Swansea Roads, in connection with issuance of an SRP for the 1997 Ridgecrest-Lone Pine dual sport motorcycle event. He stated only that the "[Ridge and Swansea Roads portion of the] route has been denied and is not authorized for use under th[e] [SRP]." (Decision at 1.) Nonetheless, it is clear from the record including the contemporaneous AD dated April 14, 1997, 4/ that the Ridgecrest Area Manager acted

4/ The AD was dated 15 days later than the Mar. 31 decision, but it is obvious from the language of the Mar. 31 decision referring to the SRP "signed on April 14, 1997," that these two documents were contemporaneous.

in accordance with the Bishop Area Manager's February 1994 IMP decision which provided that both roads would remain open for casual use but that no SRP's would be issued for events using those roads. (April 1997 AD at 2.) The appellant had sought both commercial use of the roads and use in connection with an ORV event involving more than 50 vehicles, both of which require an SRP under the regulation at 43 C.F.R. § 8372.1-1. 5/

Appellant has not sustained the burden of showing error in the rationale for the Ridgecrest Area Manager's decision to deny the requested ORV use of the Ridge and Swansea Roads. The Manager's action was clearly taken to protect the wilderness resources of the adjacent wilderness area from the adverse effects which might result from such use. (BLM Answer at 3 ("[R]ationale and supporting documentation for the denial of the permit is contained in the environmental assessments".)) It is well established that BLM is authorized, under 43 C.F.R. § 8372.3, to take action to avoid adverse effects to resources on the public lands, including wilderness resources, when it reasonably anticipates such effects may occur. See Desert Vipers Motorcycle Club, 142 IBLA 293, 299 (1998) (adjacent designated wilderness areas); Lassen Motorcycle Club, 133 IBLA at 109-12; Southern California Trials Association, 104 IBLA 141, 142-44 (1988); Cascade Motorcycle Club, 56 IBLA at 138. In addition, BLM may preclude or restrict recreational use while awaiting preparation of a management plan which will more fully address the issue of whether, to what extent, and under what circumstances such use can be permitted. Desert Vipers Motorcycle Club, 142 IBLA at 294, 300; Checker Motorcycle Club, 126 IBLA at 255; Four Corners Expeditions, 104 IBLA at 125-26.

Except to the extent that they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by appellant are rejected on the ground that they are contrary to the facts and law or are immaterial.

Appellant seeks a hearing, arguing that there are disputed questions of fact. (Request at 6.) We are not persuaded that there are any material issues of fact upon which resolution of this case depends and, hence, the request for a hearing is denied. Woods Petroleum Co., 86 IBLA 46, 55 (1985).

5/ The appellant also stated that "[i]f any of the routes [proposed] are not open to the 120 riders expected, then [we are] requesting a permit for 49 riders on those routes or for what ever size group the route is open to." (Letter to BLM from Counts, dated Jan. 14, 1997.) Even if the application was for 49 vehicles, it was a commercial application requiring a permit under the regulations. 43 C.F.R. § 8372.1-1(a). It should be noted, however, that apart from commercial or competitive events, casual use by less than 50 ORV's does not require a permit and is not barred.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge